first impression—it would lead to consequences that never were contemplated. It would follow that every sentence pronounced by the Court of Queen's Bench would be subject to be reviewed summarily by a judge at chambers."

In *Re Francis Robert Newton*, 16 C.B. 97, where the prisoner was convicted of wounding at the Central Criminal Court, application was made for a writ of *habeas corpus* on the ground that the offence charged was committed in a place outside the jurisdiction of that Court. Again the Court refused the application holding that the prisoner's remedy was to proceed by writ of error. Jervis, C.J., said:—

> "Failing that remedy, the party cannot question the truth of the record upon a *habeas corpus*. This does not leave the the party wholly without redress; he may obtain it from the prerogative of the Crown. He may make application to the Secretary of State. Possibly that course has already been resorted to without success (Hodgson intimated that this was the fact). I am clearly of opinion that this application is as groundless as it is unprecedented."

I am satisfied that proceedings under section 363 do not apply where the applicant is detained under an order of a judge of the Supreme Court. The application is, therefore, dismissed. I make no order as to costs.

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[ORIGINAL CIVIL JURISDICTION]

BURTON, J.

September 6, 1930.

**K.A.L.R.M. KARUPPAN CHETTIAR...Plaintiff**

**vs.**

**SUBRAMANIAM CHETTIAR**
**THE OFFICIAL ADMINISTRATOR, F.M.S.**
**PALANIAPPA CHETTIAR**
**MUTHUKARUPPAN CHETTIAR** } **Defendants**

[PERAK CIVIL SUIT No. 370 of 1930]

*Probate and Administration Enactment 1920, Section 30 — Construction — Powers of Official Administrator.*

By the true construction of Section 30 of the Probate and Administration Enactment 1920, the official administrator is merely placed in the position of a receiver of the intestate's estate pending the grant of letters of administration, and he cannot be sued by virtue of this section alone.

*S. H. Lewis* for Plaintiff.

*S. Seenivasagam* for Defendant No. 2.

**BURTON, J.**—This action is a partition action, and it is necessary that all parties should be before the Court. Ramasamy Chetty is however dead and no one has been appointed his representative. The plaintiff has therefore sued the Official Administrator as "the person in whom is now vested the property of V. R. M. L. Ramasamy Chettiar deceased lately carrying on business in the Federated Malay States under the style of L. N." The plaintiff relies on Section 30 of the Probate and Administration Enactment 1920.—

> "From and after the decease of persons dying intestate and until letters of administration shall be granted in respect of their estates and effects, the estates and effects which were of such deceased persons shall be vested in the Official Administrator."

This section corresponds with section 19 of the Court of Probate Act, 1858 (21 and 22 Vict. Cap. 95) which vests the property in the Judge of the Court of Probate.

I do not think that Section 30 can be interpreted to mean that the Official Administrator can be sued in respect of an intestate estate without more. In *Chan Kit San* v. *Ho Fung Hang*, (1902) A.C. 257, the Privy Council held that the effect of the corresponding section in a Hong Kong Ordinance was to put the Official Administrator in the position of a Receiver of the intestate's estate pending the grant of letters, but without power to sue in respect thereof. I think it is clear too that he cannot be sued by virtue of this section. The section does not give him the power of an administrator and he could not administer an estate vested in him under this section without further order. If it were otherwise section 29 would be largely superfluous. I think therefore that the Official Administrator is wrongly joined and I order that he be dismissed from the action, with costs.

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[ORIGINAL CIVIL JURISDICTION]

MUDIE, J.

October 4, 1930.

**P. L. A. L. N. ALAGAPPA CHETTY.....Plaintiff**

**vs.**

**BAN JOO LEE & CO.**
**LI KIM CHUAN** } **.....Defendants**

[NEGRI SEMBILAN CIVIL SUIT No. 224 of 1929]

*Limitation Enactment 1896, Second Schedule Art. 77—"Other relief" in consequence of fraud.*

Article 77 in the second schedule of the Limitation Enactment is wide enough to include an action for damages for deceit. The "other relief" referred to in that article need not be of the same kind, as "setting

aside a decree obtained by fraud," and the article is not thus limited to specific relief on the ground of fraud.

*A. J. Bostock-Hill* for Plaintiff.

*E. Pratt* for Defendant No. 1.

Defendant No. 2 in person.

The facts appear sufficiently from the judgment of Mudie, J.

**MUDIE, J.**—The plaintiff is a chetty, and formerly carried on business in Kuala Lumpur and Seremban as a money-lender. He became indebted to the first defendant, who is a liquor-dealer in Seremban. The plaintiff returned to India in 1921. He left his affairs in the hands of an attorney, who closed the business and went to India in 1922. The first defendant in the year 1922 sued the plaintiff in the Supreme Court, Seremban, and obtained judgment against him in Civil Suit No. 440 of 1922 for the sum of $4,116 and interest. The first defendant, as judgment creditor, proceeded in due course to execution on the said judgment and attached certain debts secured by two charges over certain immovable property. The second defendant, who was the auctioneer employed to sell the property, sold one of the charges on the 23rd May, 1923 at Kajang to the first defendant for $2,201, which was $1 more than the nominal value of the charge. On the 24th of May the other charge was to be sold at Klang. By mistake, the land itself, subject to the charge, was advertised for sale, and was bought by the first defendant for $50. The nominal value of the charge was $1,500 with arrears of interest. On the 18th December, 1923, a transfer was signed by the second defendant, transferring to the first defendant the charge on the land, and not the land subject to the charge. In June, 1924, the first defendant obtained for $50 an irrevocable power of attorney from Lim Chai, the chargor, to dispose of the land. In March, 1925, the transfer was registered, a memorandum of discharge of the charge was made by the first defendant, and the land was sold by the first defendant to P. L. L. Sevagan Chetty for $750. In January, 1926 the Chetty sold the land for $3,000. In 1927 the plaintiff returned to this country. In 1929 the plaintiff was asked to show why execution should not be levied against him in Civil Suit No. 440 of 1922, and then discovered the sale of the charge. The plaintiff now sues for the value of the charge, which he estimates at $1,500, less $50 paid, with arrears of interest, or equitable relief.

Both defendants plead that the plaintiff's claim is barred by the Statute of Limitations.

Plaintiff admits that the claim for damages for negligence against the second is statute-barred, but contends that the claim for damages for deceit against the first defendant, and the claim for equitable relief against both defendants are not barred.

It is clear that the claim for equitable relief under Articles 77 and 78 of the Limitation Enactment is not barred. As to the claim for damages for deceit, defendant's counsel contends that Article 20 applies to all torts, and therefore to fraud, and that section 18 only applies to concealed fraud. Plaintiff's counsel refers to *Rustomji*, 4th ed., 509, and the cases cited there, and contends that Article 77 applies.

In my opinion Article 77 is wide enough to include an action for damages for deceit. That is the decision in *Bank of Madras* v. *Mutan Chand Kanyalal*, I.L.R. 27 Mad. 343. The following passage occurs in the judgment of the Appellate Court at page 345.

> "We cannot accept the argument that the 'other relief' referred to in article 95 must be of the same kind as setting aside a decree obtained by fraud and thus limit the operation of the article to specific relief on the ground of fraud. The relief claimed in this case is compensation for damages caused to the plaintiff by the fraud practised by the defendant and the expression 'other relief' in article 95 is comprehensive enough to include such relief. The suit is therefore not barred by limitation."

The subject is further discussed in *Rustomji* at pages 509, 510 and 513.

I hold, therefore, that the claim for damages for deceit, as well as the claim for equitable relief, is not statute-barred.

The defence of the first defendant is that he did in fact purchase the charge, and not the land. He says further that he never took possession of the land, that on the 18th March, 1925 Lim Chai, the chargor, transferred the land to P. L. L. Sevagan Chetty, who at the same time purchased the charge from the first defendant for $750.

The defence of the second defendant is that the sale of the land instead of the charge was a mistake, and, as far as he was concerned, an innocent mistake.

The plaintiff asks for equitable relief on the ground of mistake. He says that he is entitled to compensation to the full value of the charge, $1,500 and interest. If this is an innocent mistake, the first defendant has given the plaintiff credit for $750, the benefit he received from the mistake. I do not see how equity can order him to do any more than that. As a conveyance has been made to a third person the parties cannot be restored to their original position by setting the transaction aside. All that equity could do would be to restrain the first defendant from prosecuting execution proceedings in Civil Suit No. 440 of 1922, until he had allowed the plaintiff credit for $750. He has done that. In my opinion there is no other equitable relief available. The second

defendant has made no profit out of the transaction. I do not see in what way equity can relieve against him.

I find as a fact that there was fraud on the part of the first defendant. I do not think that Soh Ah Meng, now the first defendant's manager, then his cashier, was acting dishonestly when he bought the charge at the auction sale for $50. But I consider that the proprietor of the first defendant firm knew that by a mistake he had obtained a valuable charge for $50. Though the sale was held on the 24th of May, the first defendant did nothing until the 18th of December. Then he did nothing again till June, 1924, when instead of taking a transfer in the ordinary way, he did so by the indirect method of an irrevocable power of attorney. He did not register his transfer until the day he sold the land in March, 1925, under the power of attorney. It appears from the statement of defence that he wishes us to believe that it was Lim Chai who sold the land. It may have been Lim Chai in name, but it was the first defendant in fact. The conclusion I have come to is that the first defendant realised the significance of the mistake from the beginning, was extremely wary in taking advantage of it, and endeavoured to camouflage the part he played in the subsequent proceedings which were necessary to enable him to reap the profit. He put the profit in his own pocket. He did not pretend otherwise, until at the last moment. Soh Ah Meng in the witness box said that credit had been given for the amount. In my opinion this was a deliberate attempt by the first defendant to swindle the plaintiff out of his property by taking advantage of the innocent mistake of the second defendant.

Fraud is not defined. See *Kerr* on *Fraud and Mistake* page 1,

> "All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered as fraud. Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to."

I am of opinion, therefore, that the plaintiff's claim for equitable relief must fail, but that he is entitled to succeed in his claim for damages for deceit.

The measure of damages is the value of the charge at the date of the sale, less the $50 paid for it. I assess the value of the charge at the principal value plus arrears of interest.

There will be judgment for the plaintiff against the first defendant for $1,450 and interest at 24% on $1,500 from the 7th May, 1920, to the 24th May, 1923, and costs.

The claim against the second defendant will be dismissed with costs.

The amount of the judgment is to be set off against the decree in Suit No. 440 of 1922.

[ORIGINAL CIVIL JURISDICTION]

ELPHINSTONE, C.J.

November 27, 1930.

**KHEM SINGH..... Plaintiff**

**vs.**

**ANOKH SINGH.....Defendant**

[SELANGOR CIVIL SUIT No. 151 of 1930]

*Contract Enactment, 1899, Sections 23 and 65—Marriage Brokage—Recovery of money paid.*

A marriage brokage agreement is void as having an object opposed to public policy within the meaning of Section 23 of the Contract Enactment; but such an agreement falls within Section 65 of the Contract Enactment and money paid under it can be recovered back by the person who paid it.

The decision in *Srinivasa Ayyar* v. *Sesha Ayyar*, I.L.R. 41 Mad. 197, that a marriage brokage agreement does not fall within Section 65 of the Contract Act dissented from.

The principle that a marriage brokage agreement is illegal applies equally well to Sikhs as to Hindus.

*J. M. Lahiri* for Plaintiff.

*S. M. Sharma* for Defendant.

*Cur. adv. vult.*

The facts appear sufficiently from the judgment of C.J.—

**ELPHINSTONE, C.J.**—In this suit the plaintiff alleges an agreement by the defendant to give his daughter in marriage to the plaintiff and to fetch her from India to Kuala Lumpur, the plaintiff paying to the defendant the sum of $1,000 for expenses. He says that the defendant failed to bring his daughter and claims a refund of money advanced to the defendant for expenses and also the value of jewellery and cloth entrusted to the defendant as presents for the bride. His total claim is for $977.91. The defendant denies that he agreed to give his daughter in marriage to the plaintiff. He says he has no unmarried daughter, but alleges that he agreed with the plaintiff to arrange a marriage between the plaintiff and the defendant's widowed sister-in-law who lives in India and is the sister and ward of one Bara Singh. The defendant alleges that the plaintiff agreed to pay Rs. 2,000 to Bara Singh the bride's guardian, but failed to do so, and that for this reason the lady refused to leave India.

The defendant also alleges that the plaintiff agreed to pay his expenses and lost pay and in addition the sum of $250 as commission for arranging the marriage. He accordingly counterclaims for those items and also for Rs. 50 advanced to the plaintiff, his total counter-claim being for $339.80.